Editor's note: dismissed for lack of jurisdiction, Civ. No. F9-16 (Alaska date unknown); aff'd, No. 94-35130 (9th Cir. Nov. 7, 1994), 41 F.3d 1513 (table), recon rejected (Dec. 1994), cert denied No. 94-1523 (S.Ct. June 26, 1995), 115 S.Ct. 2609

STATE OF ALASKA

IBLA 90-225 Decided Decmber 21, 1992

Appeal from a decision of the Glennallen District Manager, Alaska, Bureau of Land Management, declaring right-of-way A-063173 null and void as to lands within Native allotment AA-6000, Parcel B.

Affirmed.

1. Alaska: Native Allotments--Rights-of-Way: Nature of Interest Granted

Where, after a Native initiates use and occupancy of certain lands, a right-of-way is sought and granted by BLM across such lands, subject to valid existing rights, the later filing of the allotment application vests the inchoate preference right arising from use and occupancy, and that right relates back to the initiation of use and occupancy, thereby taking precedence over the intervening right-of-way, which is properly declared null and void.

APPEARANCES: E. John Athens, Jr., Esq., Assistant Attorney General, State of Alaska, Fairbanks, Alaska, for appellant; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The State of Alaska, Department of Transportation and Public Utilities (State), has appealed a January 19, 1990, decision by the Glennallen District Manager, Alaska, Bureau of Land Management (BLM), declaring right-of-way A-063173 null and void as to lands within Native allotment AA-6000.

On March 27, 1972, Native allotment application AA-6000 was filed on behalf of Lucy Williams by the Bureau of Indian Affairs. Williams claimed use and occupancy of the land from July 1955. The allotment, designated as AA-6000, Parcel B, was legislatively approved effective June 1, 1981. 1/

1/ Parcel B is described as the SE¼ SW¼ SW¼, lot 13, sec. 27 and lots 8, 9, and 13, sec. 34, T. 2 S., R. 4 E., Copper River Meridian, Alaska.

On August 17, 1965, the State of Alaska, Department of Highways, filed application A-063173 for a material site right-of-way for use in construction and maintenance of the Edgerton Highway between Kenny Lake and Chitna. Pursuant to the Act of August 27, 1958, 23 U.S.C. § 317 (1988), the right-of-way was granted on April 28, 1966, subject to all valid existing rights existing on the date of the grant.

In the decision here appealed, BLM declared the right-of-way null and void as to lands within Native allotment AA-6000 because the allotment applicant's use and occupancy predated the filing of the right-of-way application.

The State contends that it should be allowed to contest the allotment, that the allotment should be adjudicated, that the right-of-way is a valid existing right, that legislative approval does not preclude inquiry into the sufficiency of the allotment applicant's use and occupancy, and that the Department is without jurisdiction to consider the allotment, and is estopped to deny the validity of the right-of-way. The State requests that we reexamine our position as set forth in State of Alaska, 110 IBLA 224 (1989), stipulation for dismissal filed, State of Alaska v. Lujan, No. F90-006 (D. Alaska June 22, 1992).

[1] BLM asserts that the arguments proffered by the State have been addressed in State of Alaska, supra. That case involved a conflict between Federal Highway Act rights-of-way and Native allotments, where the allotment applications were filed after the grants of the rights-of-way, but Native use and occupancy preceded those grants. There, as here, the rights-of-way were granted subject to valid existing rights: the rights of the Native allottee who had used and occupied the land before the filing of the right-of-way applications. In State of Alaska, 110 IBLA at 229, we found applicable the valid existing rights analysis articulated in Golden Valley Electric Association (On Reconsideration), 98 IBLA 203, 208 (1987). That rationale is that an inchoate preference right, established by Native use and occupancy at the time of the right-of-way grant becomes a vested preference right upon completion of use and occupancy and the filing of an allotment application and "preempts conflicting applications filed after [initiation of use and occupancy] although prior to filing of the Native allotment application." (Emphasis supplied.) Further, responding to an argument that the allotment should issue subject to the rights of way, we noted that no authority had been cited under which BLM would be required to so limit the allotment. State of Alaska, 110 IBLA at 229, n. 4. These decisions are dispositive of the present appeal.

The State's arguments relating to jurisdiction and estoppel were considered and rejected in State of Alaska, Golden Valley Electric Association, 110 IBLA at 230, 231.

To the extent that the State has made other arguments that have not been expressly discussed, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge